PART-TIME WORKER NOT ENTITLED TO SENIORITY ALLOWANCE

Auckland Clerical and Office Staff Employees I.U.W. v. **Consolidated Hotels Ltd,** Industrial Court, Rotorua, March 1977, Jamieson J.

The Auckland Clerical and Office Staff Employees Industrial Union of Workers (hereafter referred to as "the Union") sought judgment for penalties under ss 147, 148 and 151 of the Industrial Relations Act 1973 (hereafter called "the Act") for two breaches of the New Zealand Licensed Hotel Clerical Workers Collective Agreement (hereafter called "the Award," per s 82 (9) (b) of the Act as amended by s 10 (2) of the Industrial Relations Amendment Act (No. 2) 1976). That award is dated 16 December 1975 and is recorded at 75 B.A. 9915. The alleged breach took place at the Putaruru Hotel, owned and operated by Defendant, Consolidated Hotels Ltd.

The first breach alleged by the Union concerned non-payment of a continuous service allowance, per Clause 2 (a) of the Award, to a part-time worker. The second alleged breach involved non-payment of a shift allowance to the same part-time worker (Mrs J. H. Cassidy). The Union did not seek recovery of money payable under the Award but, instead, in the words of Jamieson J. "pressed for the maximum penalty." The Court found no breach of award with respect to the first complaint and, although a breach was found regarding the second complaint, chose not to inflict any penalty. Because the judicial approach to the first complaint is so markedly dissimilar to the judicial approach to the second complaint, and because the approach to that first alleged breach is so out of keeping with all the precedents set in this area (and noted in this **Journal**), this note will canvass in some detail the facts of the case and the rationale of the decision. It is submitted, with all due respect, that the Court has approached the first complaint with "the incertain and crooked cord of discretion" instead of "the golden and streight met-wand* of the law. [sic]" (4 Coke's Institutes 41, as quoted in **Inland Revenue Commissioners** v. **Westminster (Duke)** [1936] A.C. 1 at 19).

The Award pertains to three types of hotel clerical workers: full-time, part-time and casual. It is conceded by all parties that Mrs Cassidy is a part-time worker, and her hourly rates of pay are set out in Clause 8. Part-time workers receive a premium rate, vis-a-vis full-time workers and, in turn, casual workers, per Clause 10, receive a premium rate vis-a-vis part-time workers.

The Union submitted that Mrs Cassidy should receive a continuous service allowance per the terms of the following sub-paragraph, set out in full, of Clause 2 (a):

> "Any worker upon completing one year's continuous service with the same hotel or with the same employer shall be paid $2.87 per week in addition to the wages set out herein."

The next sub-paragraph, the fourth sub-paragraph in Clause 2 (a) reads as follows:

> "No worker shall have his wages reduced by virtue of changes in this agreement."

Clause 2 is entitled "Wages," and it is undeniable that the entire clause, including Clause 2 (a) is primarily aimed at full-time workers. (The word "wages" ordinarily connotes a regular, periodic payment made to full-time workers, either weekly or fortnightly). The first sub-paragraph sets out a scale of wages depending on three variables: sex of employee (obsolete after 1 April 1977); number of clerical staff in the office; and rank of employee in the office. The first sub-paragraph, and the second and fifth sub-paragraphs which make certain exceptions to the scale for big offices and for workers over 22 years of age, are undeniably applicable only to full-time workers. The third and fourth sub-paragraphs, however, as set out above, begin with the words "Any worker" and "No worker" respectively, and prima facie apply to all three types of employment.

The employer argued that Clause 2 ("Wages") and Clause 8 ("Part-time Workers") were mutually exclusive, and that Clause 8 in particular is a code, and is

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* Precision or accurate measure (Ed.).

the complete employment contract for part-time workers. This interpretation would rule out inclusion of part-time workers under any sub-paragraph of Clause 2 (a). However, the Court properly decided against this submission, and noted that many other provisions of the Award, in addition to Clause 8, apply to part-time workers. Clause 11 ("Record of Service"), Clause 13 ("Disputes"), Clause 14 ("Personal Grievances"), Clause 15 ("Under-rate Workers"), Clause 16 ("Unqualified Preference"), Clause 17 ("Deduction of Union Subscriptions"), Clause 18 ("Right of Entry"), Clause 19 ("Wages Book"), and Clause 20 ("Equal Pay Act 1972"), all must apply equally to any sort of employee. In addition, when it was thought necessary to exclude one type of worker, the exclusion is expressly set out, as in Clause 12 ("Terms of Employment"), which begins "Except in the case of casual workers . . . " Nor could it be seriously argued that the Clause 5 ("Conditions as to Offices") requirements regarding toilets, soap, hot water, and towelling apply only to full-time workers. Generally an Award provision (especially when it begins with the phrase "Any worker" or "No worker") would seem to apply to all types of employment unless express exceptions are made, as in Clause 12.

The Court might have come to an equitable result, and denied the Union's first claim, by interpreting the words "Any worker" in the third paragraph as being limited by the final phrase in the sentence "in addition to the wages set out herein." It was open to the Court to interpret "herein" as a reference to Clause 2 (and not the entire award) and to interpret "wages" as a reference to the weekly scales set out in the first sub-paragraph of Clause 2 (a). (On the other hand, the word "wages" is not always indicative of full-time weekly earnings. The word is used in Clauses 12 (a). 12 (b), 12 (e), 14 (e), 15 (a), 15 (b), 15 (c), 15 (e), 16 (e), 17, 19 (a) and 20 as referring to moneys earned either as a weekly, 40-hour wage, or as the multiple of an hourly rate multiplied by the number of hours worked).

The Court, however, eschewed careful statutory interpretation and substituted its own value judgment, saying that it would be "anomalous" to apply an allowance of $2.87 to full-time and part-time workers equally. The Court disregarded the phrase "Any worker" without discussion and concluded that the parties "could not have intended" such a result.

The substantive "anomaly" referred to by Jamieson J. is simply that a part-time worker will derive "a greater proportionate benefit from the allowance than a full-time worker." The full-time worker gets an additional 7 cents an hour, while a part-time worker on, say, 20 hours a week, would get an additional 14 cents an hour, or twice as much. The Award, however, is replete with such anomalies, much more striking — such as the more than 20 cents an hour bonus for part-time workers generally. (If a two-person office is chosen, the bonus is closer to 40 cents an hour). And the wage for a "casual" worker, in a Monday to Friday 40-hour week, amounts to more than double the average full time wage. This Award, and other Awards, generally make the employer pay a premium for the privilege of employing part-time workers. Seen in that light, a uniform continuous service payment is not "anomalous" in the least.

Nevertheless, the most significant aspect of this decision is not the substantive answer, but the legal reasoning employed to get that answer. The Court was willing to substitute its own value judgment for the plain words ("Any worker") of the Award. Such an approach is in plain conflict with many previous decisions of the Industrial Court. In **Pickford (Inspector of Awards)** v. **Canadian Construction Co. Ltd,** 17 July 1975 (noted at (1976) N.Z.J.I.R. 20) the Court ruled, over a dissenting judgment, that meal money was payable to shift-workers on ordinary time. That result was "anomalous," and probably not in concert with the original intent of the parties, but it was necessary by the plain meaning of the meal money clause.

More recently, in the **Wattie Canneries** case, decided on 20 September 1976 and noted in these pages at (1976) N.Z.J.I.R. 75, the Court decided that dirt money must be paid to electrical workers who perform their task up in the air, because of the plain meaning of the words in the sub-clause. It is relevant that in that case the Court ignored the Title of the relevant clause ("Dirt Money") and preferred the language of the sub-clause. The instant case represents the opposite approach.

And finally, in another recent decision, **Richards (Inspector of Awards** v. **Mayor of Wanganui**, 20 August 1976 (IC 42/76), the

Court reached another "anomalous" decision by finding that a poorly drafted award required double payments for travelling tradesmen.

Significantly, the Court reverted to a strict statutory interpretation approach to deal with the second complaint, and found that a shift allowance was applicable to part-time workers, like Mrs Cassidy, in spite of the anomalies. The shift allowance in question, per Clause 3 (d), is payable to any worker who starts work after 12 noon and finishes before 11.30 p.m. This means that full employment between 11.00 a.m. and 8.00 p.m. does not attract the shift allowance, but a two-hour stint between 1.00 p.m. and 3.00 p.m. would attract the allowance. As the Court said, the full-time worker "might have good reason to feel hard-done by." Furthermore, the shift allowance is payable, per Clause 3 (d), "in addition to the weekly wage." So Mrs Cassidy receives a weekly wage in so far as a shift allowance is concerned, but not with respect to a continuous service allowance.

It is submitted that this judgment itself is anomalous, both with respect to inconsistencies within the two prongs of the decision and with respect to all previous decisions of the Industrial Court which have considered problems of interpretation. Whether the approach to the first complaint heralds a new flexible approach by the Industrial Court remains to be seen. ⊙

STATUTORY PERSONAL GRIEVANCE PROCEDURE NOT AVAILABLE TO WORKERS NOT COVERED BY AWARD

Auckland Freezing Works and Abattoir Employees Industrial Union of Workers v. **Te Kuiti Borough Council.** Court of Appeal, Wellington, 23 November 1976 (C.A. 89/76). Richmond P., Woodhouse and Cooke J. J.

Two slaughtermen at the Te Kuiti Borough Council abattoir joined the Auckland Freezing Works I.U.W. (hereafter, "the Union"). There is no award or collective agreement applicable to employment at this abattoir, and their membership in the union was thereby voluntary. The Borough Council dismissed the two men in question, and the Union sought a decision from the Industrial Court, under Clause (g) of the standard procedure for settlement of personal grievances set out in section 117 (4) of the Industrial Relations Act 1973.

The judge of the Industrial Court, upon the motion of the Borough Council, stated a case for the Court of Appeal under section 51 of the Act. The question for the Court of Appeal was whether the standard procedure set out in s. 117 (4) is available in the case of a worker whose employment is not covered by an award or collective agreement.

The Court of Appeal noted that the standard procedure set out in subsection (4) of s. 150 would be brought to life by subsections (2) and (3) of s. 150: that is, by inclusion in an award or agreement. Operation of the procedure can only commence after such incorporation. The procedure can not have legal effect in vacuo; like most modern appliances it can not operate until plugged in.

The Court of Appeal therefore concluded that the standard procedure was not available. Court would, therefore, have no jurisdiction to hear any referral from an ad hoc grievance committee. ⊙

"VICTIMISATION" PROTECTION EXTENDED TO WORKERS NOT COVERED BY AWARD

New Zealand Insurance Guild Union of Workers v. **Insurance Council of New Zealand.** Industrial Court, Wellington. 19 November 1976 (I.C. 54/76). Jamieson J.

This decision of the Industrial Court is especially important for those unions with a salary bar. The Court concluded that section 150 of the Industrial Relations Act 1973 (usually referred to as the "victimisation" section) can protect workers who are above the salary bar and thereby not covered by an award.

The worker in this case, Mr R. J. Estall, took employment with the defendant Insurance Council (hereafter, "the Council") as an Assistant Technical Officer in 1972, and apparently joined the plaintiff Insurance Workers Union (hereafter, "the Guild") at the same time.

After two years as an Assistant Technical Officer in Christchurch, Estall was promoted to a position in Wellington, where he had more responsibilities, as the only technical officer in that region. He received a higher salary as of November 1974, and because of the salary bar in the Insurance Workers Award (as recorded at 75 B.A. 5493) he was no longer covered by the terms of that Award. Such employees are in fact in an individual contract of employment with their employer, although their individual contract may (or may not) incorporate terms of their previous award. Estall remained a member of the Guild, apparently thinking that he was covered by the award in every particular except salary.

After certain personality clashes and other problems in the Wellington office, Estall was transferred laterally, with no loss in salary, to a position in the Chief Technical Office. This lateral move took place in November of 1975.

At this stage Estall and the Guild took steps to set up a personal grievance committee under Clause 22 of the Award (per s. 117 of the Industrial Relations Act 1973) on the grounds that his employment had been affected to his disadvantage by the transfer. The Council then gave Estall notice, as of 8 December 1975, terminating his employment but paying his salary to 11 May 1976.

The Guild brought an action under s. 150 of the Industrial Relations Act, arguing that Estall had made a claim for a benefit under an award (s. 150 (1) (d)) or, in the alternative, that he had submitted a personal grievance to his employer (s. 150 (1) (f)). The Council argued that as Estall was not covered by an award, he could not claim the benefit of same, nor could he pursue any statutory personal grievance remedy.

The Court ruled, however, that claims made under a reasonable, albeit mistaken, belief are protected, and followed the decision of Blair J. in **Inspector of Awards** v. **Armoured Transport-Mayne-Nickless Ltd,** 67 B.A. 763. In that case Mr Justice Blair held that only if a claim is unjustified and unreasonable might it be treated as no claim at all and not entitled to protection under the victimisation clause. In the instant case, therefore, the employee had made a reasonable, though mistaken claim and the "broad cloak of protection" would be thrown round him. Furthermore, the reference to "personal grievance" in s. 150 (1) (f) was not limited to the remedy set out in model form in s. 117, but included what might be called common law contract disputes.

The Court found further that the employer Council had not satisfied the onus of proof in ss 2 of s. 150; the employer had not demonstrated that the dismissal was for some reason unrelated to his claim.

The employer had therefore violated s. 150 and the Court inflicted a penalty of $50 against the Council, plus $350 lost wages and reinstatement of Estall in the position last held prior to his dismissal. ⊙

MUTUALLY EXCLUSIVE REMEDIES: A COMMENT ON SECTION 150 AND THE MODEL IN SECTION 117

The **Te Kuiti Abattoir** case and the **Insurance** Workers case, as noted above, illustrate aspects of the personal grievance remedy and the victimisation section, respectively. The purpose of this comment is to compare and contrast these two remedies. It is submitted further, that not only are both cases legally correct, but also they faithfully follow the spirit of the Industrial Relations Act.

Seen together, the two remedies cover much the same ground; on the other hand, however, many victimisations would be pre-union or pre-award and thus not covered by personal grievance as defined in s. 117. Conversely, many personal grievances would not amount to victimisation. Both remedies are for the union concerned (as opposed to the injured worker) and, in addition, the Inspector of Awards may bring an action under section 150 but he would have no standing to pursue a personal grievance. Under the model clause set out in s. 117, the full powers of the Court, per subsection (7) come into play only when a **dismissal** is found unjustifiable. If the grievance concerns something less than a dismissal, the court can make "a final settlement which shall be binding on the parties" per s. 117 (4) (i) but no specific powers are given to the Court. And under the form in s. 117, any remedy is discretionary — the Court can find an "unjustifiable dismissal" but give no compensation to the worker and order neither reimbursement nor reinstatement. See **Smith** v. **Crown Crystal Glass** 74 B.A. 3781. Under section 150, on the other hand, lost wages **must** be awarded to a victimised worker — a penalty up to $400, plus reinstatement and other compensation remain discretionary with the Court. And under s. 150 the Court has its full complement of statutory powers for any form of victimisation, including an injury less than dismissal.

Finally, there is the contrast between the two sections thrown into relief by the two cases noted above: section 150 can be activated where there is no award coverage, whereas s. 117 is tied to and requires the pre-existence of an award or agreement. Section 117 is contained in Part VII of the Industrial Relations Act and is part of a codified scheme to provide procedures for settlements of every dispute of right. To allow the s. 117 remedy to take effect outside the award system would tend to defeat the very purpose of the code. The **Abattoir** decision should encourage unions to extend their award coverage. On the other hand, s. 150 must cover pre-award situations, in order to protect and encourage unions in the act of formation, and unions in pursuit of their first agreement.

Inflationary wage settlements will continue to push workers up and over the bar in white collar awards; unions are in danger of losing coverage over senior employees. The lesson for union officials in these two cases — for those unions with membership beyond the pale of award coverage in a geographic sense, and for those losing coverage by operation of a bar — is to frame complaints, where ever possible, under the rubric of victimisation. Any union member, further more, whose salary pushes him over the bar should get specific confirmation of his individual contract of employment, and dispute settlement thereunder. ⊙

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